# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

CHILDREN'S HOSPITAL MEDICAL CENTER OF NORTHERN CALIFORNIA d/b/a CHILDREN'S HOSPITAL OAKLAND

and

Case 32-CA-17432

CALIFORNIA NURSES ASSOCIATION

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## **DECISION**

#### Statement of the Case

**Gerald A. Wacknov, Administrative Law Judge:** Pursuant to notice a hearing in this matter was held before me in Oakland, California, on June 16, 2003. The charge in the captioned matter was filed by California Nurses Association (CNA or Union) on May 10, 1999. Thereafter, on February 25, 2003, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Children's Hospital Medical Center of Northern California d/b/a Children's Hospital Oakland (CHO or Respondent or Hospital) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), counsel for the Respondent, and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

# **Findings of Fact**

## I. Jurisdiction

The Respondent is a California non-profit corporation with an office and place of business in Oakland, California, where it is engaged in the operation of an acute care hospital.

In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$250,000, and annually purchases and receives goods and materials valued in excess of \$5,000 which originate outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

# II. The Labor Organization Involved

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

# III. Alleged Unfair Labor Practices

### A. Issues

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The principal issue in this proceeding is whether the Respondent has violated Section 8(a)(1) of the Act by filing a complaint under Section 301 of the Labor Management Relations Act in the United States District Court for the Northern District of California alleging that the Union has violated the no-strike provisions of a collective bargaining agreement between the parties.

## **B.** Facts

# 1. Background

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The Respondent's hospital workers are represented by six different unions. In the summer of 1998 the Respondent was engaged in contract negotiations with one of those unions, ILWU, Local 6, AFL-CIO (Local 6), representing a unit of seventeen X-ray technologists. Because the Respondent and Local 6 were unable to reach agreement on a successor contract, Local 6 gave notice of its intent to engage in a primary strike on August 31, 1998. On August 17, 1998, the Union, representing approximately 750 registered nurses at the hospital, sent the following notice to the Respondent advising that it intended to engage in a sympathy strike on August 31, 1998, as follows:

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Pursuant to Section 8(g) of the National Labor Relations Act, as amended by the health care institution amendments of 1974, the California Nurses Association hereby gives notice of our intent to engage in a strike for a period of 24 hours in sympathy with the primary strike of ILWU, Local 6, AFL-CIO.

The primary strike was averted when Local 6 and the Respondent reached a collective bargaining agreement on August 28, 1998; thereupon the Union withdrew its notice to engage in a sympathy strike.

Respondent states in its United States district court complaint, *infra*, that a strike by
Local 6 X-ray technologists "would have necessitated virtually no change" in its operations, but
preparations for the sympathy strike by the registered nurses caused the Respondent "to take
expensive and extraordinary precautions" because of the potential large-scale disruption of its
operations. <sup>1</sup>

<sup>&</sup>lt;sup>1</sup> Clearly the Union's ability to combine its considerable support with the efforts of some seventeen Local 6 members, whom the Respondent seems to admit had only minimal economic Continued

# 2. Court Litigation

On February 9, 1999, the Respondent filed a "Complaint for a Permanent Injunction,
Declaratory Relief, and Monetary Damages" under Section 301 of the Labor Management
Relations Act in the United States District Court for the Northern District of California. The
complaint alleges that the Union has violated the terms of the no-strike clause contained in the
current collective bargaining between the parties. The no-strike clause is as follows:

## G. NO STRIKES OR LOCKOUTS

There shall be no strikes, lockouts, or other stoppages, or interruptions of work, during the life of this agreement.

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The complaint goes on to allege that such a broad no-strike clause prohibits sympathy strikes, and further, that "The parties have taken no action which in anyway (sic) rebuts the... presumption that the no-strike clause prohibits sympathy strikes."

On March 3, 2000, United States District Judge Vaughn R. Walker issued an Order granting the Union's motion for summary judgment and dismissed Respondent's lawsuit in its entirety. *Children's Hospital Medical Center of Northern California*, 163 LRRM 2724 (N.D. Cal. 2000).

The court notes that the right to engage in a sympathy strike may be waived by the
union representing employees in a collective bargaining agreement only if the waiver of such a
right is "clear and unmistakable," Further, contrary to the position of the Respondent, the court
determines that it "will apply the clear and unmistakable standard to its interpretation of the nostrike provision at issue."

Citing Indianapolis Power & Light Co. v. NLRB, 898 F2d 524, 527 (7th Cir. 1990), the court states:

Thus, the inquiry at the summary judgment stage is whether a reasonable factfinder could conclude based on extrinsic evidence of bargaining history and past practice that in adopting the no-strike clause the parties intended to prohibit sympathy strikes.

Then, after noting that his findings are based on undisputed extrinsic evidence that is "compiled in the parties' separate statements of material facts," Judge Walker reviews both the bargaining history and the relevant evidence of past practice, and concludes as follows:

As with evidence of bargaining history, the past practice of threatened CNA sympathy strikes and hospital inaction leaves no room for the conclusion that such strikes fall within the scope of no-strike provision in the parties' collective bargaining agreement. The parties have submitted additional evidence, none of which raises a genuine issue of material fact on this issue. The court has

leverage, is a situation that the Respondent would very much like to neutralize. <sup>2</sup> Citing, *inter* alia, IBEW *Local 1395 v NLRB*, 797 F2d 1027, 1029 (DC Cir 1986), and *Metropolitan Edison Co. v. NLRB*, 460 US 693, 708 (1983); *OCAW Local 1-547 v NLRB*, 842 F2d 1141 (9th Cir 1988).

considered all the evidence, and need not parse it here. The court finds that there is no triable issue regarding whether the no-strike clause represents a "clear and unmistakable " waiver of sympathy strike rights. Upon consideration of extrinsic evidence, a reasonable trier of fact could only conclude that it does not.

The Respondent appealed this order to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit issued its decision on March 23, 2002 (283 F.3d 1188). The court noted that it reviews district courts' summary judgment orders *de novo*, citing *Playboy Enterprises*, *Inc. v. Welles*, 279 F.3d 796 (CA9, 2002). In *Playboy Enterprises*, the court states:

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We review the district court's grant of summary judgment de novo. Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. The court must not weigh the evidence or determine the truth of the matter but only determine where there is a genuine issue for trial. (Footnotes omitted.)

The court, citing the precedent underlying its "well established rule" that a contractual waiver of sympathy strike rights must be "clear and unmistakable," then goes on to find the Respondent's "unusual" argument to the contrary to be premised on "two fundamental errors":

First, neither the language of the NLRA nor logic supports the distinction the hospital seeks to draw between the union's right and those of its members.

\* \* \*

The second flaw in the hospital's argument is that *Wright* [*Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 119 S. Ct. 391(1998)*] does not alter our analysis of waivers of strike rights. To the contrary, it supports CNA's argument... Thus, nothing in *Wright* requires us to depart from our precedent that a union's waiver of the right to engage in a sympathy strike must be clear and unmistakable.

\* \* \*

We therefore affirm our earlier holdings that the waiver of the right to engage in sympathy strikes must be clear and unmistakable. This holds true regardless of whether workers seek to exercise that right in the absence of any union action, or whether the union asserts the right to call a sympathy strike on behalf of those it represents. In both instances, if the union and the employer have negotiated a waiver of the members' statutory right to strike, we must carefully examine the scope and circumstances of the particular waiver provision to determine whether the right to engage in sympathy strikes has been clearly and unmistakably waived.

The court reviews the long bargaining history between the parties and concludes that, "The history of bargaining between CNA and the hospital strongly militates against a conclusion that the union clearly and unmistakably negotiated a waiver of the employees' right to engage in a sympathy strike." And upon reviewing the past practice of the parties over many years the court concludes, "The parties' past practice, like the bargaining history, militates strongly in favor of the conclusion that CNA did not clearly and unmistakably waive its sympathy strike rights. "The court then concludes as follows:

We reaffirm that for a union to waive the Section 7 right to engage in a sympathy

strike, the waiver must be clear and unmistakable, so that the membership will be on notice that this important collective bargaining right is being bargained away. Because the facts in this record, viewed in the light most favorable to CHO, demonstrate that there was no clear and unmistakable waiver by CNA in this case, the district court was correct to grant summary judgment in favor of the union.

# C. Analysis

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# 1. The court proceedings

The complaint alleges that the lawsuit brought by the Respondent to enjoin the Union from calling or threatening to call a sympathy strike, and to impose monetary damages for such conduct, lacked a reasonable basis in law and fact; therefore, it restrained employees in their right to engage in activities protected by Section 7 of the Act.

The parties agree that the applicable law underlying this case is set forth *in Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983), and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), and that the issue before the Board is whether the Respondent's lawsuit lacked a reasonable basis in law and fact. Since *BE & K* the Board may no longer premise the finding of a violation of the Act exclusively on whether the outcome of such a lawsuit was adverse to the plaintiff; that is, whether the lawsuit was withdrawn or found by the court to lack merit. Thus, the fact that the Respondent did not prevail in its lawsuit is not determinative of whether the lawsuit was reasonably based. Rather, a lawsuit is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits." *BE & K*, at page 526; *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 59-60 (1992). Such a test is designed to balance the rights of employees under the Act, and the rights of parties to have access to the courts for legitimate purposes.

The Respondent advances the argument that since the General Counsel had the authority to issue an immediate complaint, its failure to so until after the conclusion of the court litigation warrants the inference that the General Counsel believed the lawsuit to be reasonably based.

The charge in this case was filed by the Union on May 10, 1999, alleging that:

In retaliation against Registered Nurses for their exercise of protected Section 7 rights, within the past six months, the Employer filed a civil action in federal court which lacks a reasonable basis in fact or law.

Even assuming *arguendo* that the General Counsel initially believed the lawsuit was reasonably based, customary regional office procedure would have required dismissal of the charge; and as the charge was not dismissed, the Respondent should have reasonably understood that the General Counsel intended to review the matter upon the conclusion of the court litigation. Further, in *Bill Johnson's* the Supreme Court stated, at page 745, that "...if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts," the General Counsel should defer the unfair labor practice proceeding until the judicial action has been concluded. In its district court suit the Respondent contended that the no-strike clause, as interpreted and applied by the parties over many years, prohibited sympathy strikes. This factual contention, strongly in dispute, presented critical issues of material fact that would ultimately be resolved by the court. Accordingly, given the General Counsel's deferral of the matter, and the foregoing

pronouncement of the Supreme Court, the Respondent's purported belief that the General Counsel's inaction constituted something in the nature of a favorable advisory opinion regarding the merits of its lawsuit is clearly unfounded.

The Respondent also maintains that the district court found the lawsuit to be reasonably based. In a September 2, 1999 Order, issued without the benefit of oral argument, United States District Court Judge Vaughn R. Walker denied the Union's request for a stay of discovery in the court proceeding pending a Board determination of the instant charge. Judge Walker determined as follows:

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In light of these allegations [i.e. the Respondent's allegations that the no-strike clause prohibited sympathy strikes], and the undisputed fact that CNA planned and threatened a sympathy strike, the court need not await the NLRB's guidance in order to determine that CHO has a reasonable basis for bringing the instant action. (Bracketed language added.)

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Judge Walker's order, on a procedural matter, indicates that he was merely relying upon the Respondent's "allegations," at that early stage of the proceeding, and it is clear he was defining "reasonable basis" within that context. Until the court examined the Union's defense to the allegations there was no basis on which the court could evaluate the underlying issue in the instant proceeding, namely, whether a reasonable litigant could realistically expect success on the merits). To this latter question, Judge Walker's summary judgment order (*supra*), is quite relevant. I find this argument of the Respondent to be without merit.

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On October 28, 1999, after the parties had engaged in substantial discovery over the meaning of the no-strike clause, the Union advised the court in a document entitled "Request for Status Conference to Modify Case Management Order," of "genuine issues of material fact which cannot be resolved without an evidentiary hearing before a finder of fact." The Respondent maintains that this language constitutes a tacit admission that its lawsuit had a "reasonable basis." The Respondent is apparently arguing that if there are genuine issues of material fact, then a lawsuit cannot be baseless. As noted above, the underlying issue in this proceeding is whether a reasonable litigant could realistically expect to prevail in its lawsuit, not whether some isolated facts may arguably be favorable to one side or the other. This argument of the Respondent is without merit.

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The Respondent maintains that weight should be given to the fact that the Ninth Circuit held oral argument and issued a published opinion in this matter; therefore the lawsuit could not have been baseless because the court attached some significance to it. It would serve no purpose to speculate about the Ninth Circuit's rationale for holding oral argument and issuing a published decision. This argument is without merit.

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The Respondent respectfully disagrees with the Ninth Circuit's determination of this matter, and makes the same arguments in this proceeding that it made before the District Court and the Ninth Circuit regarding the legal and factual merits of the controversy. It maintains that the Supreme Court's rationale in *Wright*, as extended by the Second Circuit in *Interstate Brands Corp. v. Bakery Drivers & Baking Goods Vending Machines*, 167 F. 3d 764 (2<sup>nd</sup> Cir. 1999), supports its argument that union rights and employee rights are separate and distinct; that in unilaterally calling a sympathy strike, without first obtaining strike approval from the employees it represents, the Union was acting on its own behalf rather than as a representative of the employees; and that therefore, while the Union's waiver of *employees*' right to strike must be

"clear and unmistakable," the Union's waiver of *its own* right to call a strike does not have to meet the "clear and unmistakable "test. <sup>3</sup>

The Respondent had several opportunities to convince the District Court and the Ninth Circuit of its position on this principle of law. Both courts thoroughly considered and dismissed .5 the argument. Here, it is clear that the Respondent was not attempting to apply existing principles of labor law; rather it was attempting to overturn important, well-established, longstanding principles of labor law as developed and applied by the Board and courts. These principles have governed the affairs of unions and employers, including the Union and the Respondent, for many years. It could not be reasonably anticipated that such an important body 10 of law would be summarily reversed. While the Respondent constructed an argument in support of its position, the Ninth Circuit found the Respondent's argument "unusual" and its reliance upon Wright as misplaced. Indeed, it found that Wright, the principal case relied upon by the Respondent, supports the Union's position rather than the Respondent's. Accordingly, I conclude that a reasonable litigant could not realistically expect to prevail on this principle of 15 law.

The Respondent also argues that the District Court and Ninth Circuit were wrong in finding that the parties' bargaining history and past practice did not demonstrate a clear and unmistakable waiver of the right to engage in a sympathy strike. The Respondent also had several opportunities to present its evidence and arguments on this factual issue, and both courts, viewing the evidence in the light most favorable to the Respondent, granted the Union's motion for summary judgment and dismissed the lawsuit. The Respondent reargues the matter in its brief in this proceeding and maintains that the Ninth Circuit's opinion "failed to even discuss the extrinsic evidence supporting the Hospital's interpretation of the clause." The Respondent identifies the extrinsic evidence as follows:

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The 1979 letter from CNA agreeing that it could not order a sympathy strike under the no-strike clause goes unmentioned in the Court's decision. Jt. Ex. 17, Ex. 6. The Ninth Circuit does not address an eye-witness's claim that no nurses crossed the picket line in 1979. Jt. Ex. 6 at 842. The Court ignored the testimony of two percipient witnesses who stated that the 1987 no-strike proposal was presented as a clarification. Jt. Ex. 6 at 833, 885-86, 908-09. And the Court's opinion essentially side-stepped the fact that both federal and state law in 1971 and 1997 (the time of the most recent negotiations between CNA and the Hospital) construed broad no-strike clauses to prohibit sympathy strikes.

First it should be noted that if the Respondent believed that the Ninth Circuit ignored, or neglected to address, or failed to mention, or sidestepped important extrinsic evidence, the Respondent could have pointed this out to the court in a motion for rehearing. What the court did find as credible evidence, however, shows that it either discredited or gave little significance

<sup>&</sup>lt;sup>3</sup> Under the Respondent's theory, the nurses had a right to engage in a sympathy strike independently of the Union; thus the Union, but not the nurses, were subject to the no-strike clause *vis-a-vis* sympathy strikes. It would appear that argument is clearly inconsistent with the Respondent's prayer for an injunction, as follows:

<sup>2.</sup> An injunction permanently restraining CNA, its officers, agents, servants, representatives, <u>members and the employees it represents</u> from engaging in any future sympathy strikes, work stoppages, slowdowns or refusals to cross another union's picket lines; (Emphasis supplied.)

to the evidence proffered by the Respondent, as follows:

declaration dated January 20, 2000, stated as follows:

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Past Practice: In determining whether a waiver occurred, we look as well to "the interpretation of the contract by the parties, and the conduct of the parties bearing upon its meaning." Arizona Public Serv., 788 F.2d at 414. Because these two factors are so closely related, we consider them together.

The parties' past practice, like the bargaining history, militates strongly in favor of the conclusion that CNA did not clearly and unmistakably waive its sympathy strike rights. To the contrary, the evidence regarding the steps that CAN took on several occasions to initiate sympathy strikes while the current no-strike clause was in effect, and CHO's consistent lack of response is wholly inconsistent with any determination that the parties mutually intended to waive the workers' right to engage in sympathy strikes.

For example, in 1979 SEIU Local 250, which represents many CHO employees, struck the Associated Hospitals. CNA leadership testified that because many of its own members failed "to perceive themselves as having a common cause with [the striking] workers," the union, after debating whether to call an official sympathy strike, decided against doing so.<sup>4</sup> Nonetheless, some CAN-represented nurses refused to cross the Local 250 picket line, thereby forcing CHO to close at least one unit of the hospital.<sup>5</sup> Those sympathy strikers were not disciplined by CHO. Moreover, in 1983, Local 250 again engaged in a primary strike, and this time CNA issued a 10-day sympathy strike notice. Although the hospital now maintains that the understanding of the no-strike clause has always been that sympathy strikes by the employees acting on their own were permitted,

<sup>4</sup> The Ninth Circuit does not mention an April 12, 1979 letter from CNA Labor Representative Kenneth Absalom to the Respondent stating, *inter alia*, that the agreement does not prohibit registered nurses from honoring a lawful picket line of another union as a matter of personal conscience, and that "CNA will fully comply with the agreement in so far as it prohibits strike action or work stoppages directed by CNA; our membership will be so notified." The significance of this language was disputed by the parties in various depositions, and it may be reasonably presumed that the Ninth Circuit credited the statement of Absolom who, in a sworn

Nor did CNA ever indicate to Associated Hospitals in the spring and summer of 1979 that the no-strike clause in its current collective bargaining agreement with Associated Hospitals prohibited sympathy strikes. When questioned in my deposition about the last paragraph in my April 12, 1979 letter to William Drum as the Administrator of CHO...I said that I did not have a specific recollection of what my reasoning was at the time I drafted that paragraph. I do know that I was not conceding in that last paragraph that the agreement prohibited CNA from striking in sympathy with Local 250 because I do distinctly recall that CNA did not have that understanding of the no-strike clause at that time. The problem with CNA's striking in sympathy with Local 250 in the spring of 1979 was not the no-strike clause in the contract but the failure on the part of many CNA members to perceive themselves as having a common cause with other workers at the hospitals, which is a necessity before any union can call its members out on a sympathy strike.

<sup>5</sup> This language shows that the Court did not credit the Respondent's evidence that no nurses crossed the picket line in 1979.

but that the union was prohibited from calling such strikes, the record contains no communication to CNA that its proposed union-called sympathy strike would be illegal. In that case, as in this one, the primary strike was averted and the sympathy strike never occurred. Nonetheless, in 1983, CHO raised no legal objection to the proposed sympathy strike, nor did it seek clarification from the courts as to the scope of the no-strike clause. In 1996, SEIU Local 250 once again issued a ten-day strike notice, and CNA once again considered striking in sympathy. Although CNA posted a notice throughout the hospital that the nurses union would soon issue a ten-day strike notice in support of Local 250, no management official contacted CNA to assert that this was prohibited by the collective bargaining agreement.

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The only reasonable inference from the bargaining history and past practice of the parties is that, at the very minimum, CNA did not clearly and unmistakably waive any sympathy strike rights. Drawing every possible inference in favor of the hospital, as we must, the most we could conclude would be that the parties agreed to disagree about the meaning of the clause. That, however, is insufficient to support a clear and unmistakable waiver. There was indisputably no "mutual intent" to include sympathy strikes within the scope of the general nostrike clause. *Indianapolis Power*, 797 F.2d at 1036 (noting that if "the parties had agreed to disagree over whether sympathy strikes were covered by the [nostrike] clause," then "a fortiori, no clean and unmistakable waiver of the right to honor picket lines " could be found.) Thus, the general waiver of the right to strike in the collective bargaining agreement does not include sympathy strikes. (Bracketed language in original.)

Regarding the Respondent's contention that the Ninth Circuit ignored the testimony of two percipient witnesses who stated that the 1987 no-strike "proposal" was presented as a clarification rather than as a proposal, the Ninth Circuit states, *inter alia*, under the heading of *Bargaining History*, that:

CHO now contends that its 1987 proposal was merely a "clarification" of the existing language, and that it supports the inference that sympathy strikes were always included in the scope of the general no-strike provision. The history of the 1987 negotiations, however, supports the opposite conclusion: that *neither* side understood the general no-strike clause to include included a list of eleven numbered "language clarifications." The proposed sympathy strike language was not among them; instead, it was listed separately on the same document as a distinct 'proposal." The hospital now contends the placement of the sympathy strike proposal on the document apart from the proposed "clarifications" was a typographical error.

Equally persuasive, toward the end of the contract negotiations, CHO offered to accept a CNA proposal for a tenure step change in exchange for CNA's accepting the new "no sympathy strike" clause. This bargaining posture indicates CHO's belief that to include sympathy strikes within the no-strike clause's reach would be an important change in the contract's terms, and not a mere "clarification" of the status quo. Otherwise, it would have been unlikely to offer such a concession in return for the new no-strike clause provision. See Indianapolis Power, 797 F.2d at 1036, n. 10 (noting that a union's proposal to exclude sympathy strikes specifically from a general no-strike clause in two consecutive rounds of contract negotiations supported the inference that the

union did not consider sympathy strikes to be permitted by the collective bargaining agreement in the first instance.).

Finally, given the thorough analysis and findings of the Ninth Circuit, the Respondent's contention that the Ninth Circuit "side-stepped" applicable law is patently erroneous.

# 2. Efforts to arbitrate the dispute

The Respondent maintains that its lawsuit was not retaliatory. In support of this argument the Respondent argues that it did not file the lawsuit until after it requested, and the Union refused, to arbitrate the issue under the arbitration provisions of the collective bargaining agreement; this demonstrates its good faith in wanting to resolve the issue not before the courts but before an arbitrator. The initial problem with this argument is that after the Union refused to agree to arbitration, maintaining that the contract permitted only the Union to initiate grievances that could be subject to arbitration and that the Respondent had never before initiated an arbitration, the Respondent filed the lawsuit without attempting to seek court clarification of the arbitration provisions of the contract.

In its complaint the Respondent asserts that:

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22. Because CNA has refused to arbitrate this matter, CHILDREN'S HOSPITAL is required to pursue the instant claims in federal court under Section 301, 29 U.S.C. § 185.

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After the Respondent filed its lawsuit, the Union changed its position and advised the Respondent that it *would* agree to arbitrate the meaning of the no-strike issue on the condition that the Respondent would not use the arbitration proceeding as precedent for arguing that the contract permitted Respondent-initiated arbitration in the future. Thus, in an April 1, 1999 letter to the Respondent, prior to the time the Union was required to file its answer in district court, the Union states as follows:

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After consideration of various approaches to resolution of this dispute and the expense of litigation, CNA is prepared to submit CHO's grievance at issue in this case to arbitration under the procedures of the collective bargaining agreement, on a non-precedential basis. This alternative resolution process will achieve your client's goal of submitting all issues to arbitration and preserve CNA's position that employer grievances are not substantively arbitrable under the contract.

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As you know, CNA's responsive pleadings to the Complaint are due for filing tomorrow, April 2, 1999. If this proposal is acceptable, we are willing to prepare a stipulation for voluntary dismissal without prejudice under FRCP Rule 41 based on submission of the dispute to ADR [Alternative Dispute Resolution] procedures. If you and/or your client 's representatives need more time to consider this proposal, we would request a brief extension of time to file responsive pleadings until you are able to formulate a position on our proposal.

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The Respondent replied on April 15, 1999, as follows:

After considering CNA's April 1, 1999 offer to arbitrate this case, the Hospital has decided to reject that proposal. The Hospital is unwilling to arbitrate under an agreement that CNA is not obligated to do so.

The condition proposed by the Union seems quite reasonable under the circumstances: it would permit arbitration of the no-strike provision but would not change the *status quo*, that is, the parties' respective positions regarding the arbitration provision of the contract. Therefore the Respondent's refusal to arbitrate is incongruous. Consequently, from the foregoing, it appears that the Respondent, although initially professing a desire to arbitrate, was really not interested in resolving the issue through arbitration.

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#### 3. Conclusions

The stated purpose of Respondent's lawsuit was to preclude the Union from issuing 10-day notices of sympathy strikes, to preclude the Union and the employees it represents from engaging in sympathy strikes in the future, and to impose monetary damages on the Union for causing the Respondent to prepare for the announced sympathy strike; further, of course, the Respondent sought to change the provisions of the contract through court action rather than collective bargaining. Interference with such rights of employees under the Act is unlawful if undertaken for "retaliatory" purposes.

Lawsuits are disruptive, time consuming and very expensive, and it is reasonable to presume that one would not initiate a lawsuit without first critically evaluating the relative merits of the parties' positions. However, this presumption does not always hold true: lawsuits are filed and litigated for a myriad of reasons that may have nothing to do with the legal and factual merits of the controversy. Here, it seems necessary to discern the motive for the filing of the instant lawsuit by the process of elimination.

First, as noted above, it was not reasonable for the Respondent to believe that it could prevail on the legal issue, that is, the standard that should be used to determine the meaning of the no-strike clause; this would require the undoing of longstanding and well-established Board and court precedent, and, as the Ninth Circuit stated, the Respondent's argument was "unusual" and the principal case it cited favored the Union's position rather than the Respondent's.

Nor was it reasonable for the Respondent to expect to succeed on the facts. The "clear and unmistakable" burden requires a "mutual" agreement that the no-strike clause prohibits sympathy strikes. Obviously there was no mutual agreement here; given the history of collective bargaining and the past practice of the parties no other conclusion may be drawn.

Finally, Respondent has advanced no persuasive reason for refusing to arbitrate the matter under the condition imposed by the Union, namely, that the arbitration be considered non-precedential in the sense that it would not give the Respondent the continuing right to file grievances and arbitrate other matters under the contract. Clearly arbitration would have been a much less costly and much more expedient way of resolving the dispute; indeed, it was the Respondent that initiated the possibility of arbitration, and it was alleged by the Respondent in its complaint that it was compelled to file the lawsuit because of the Union's refusal to arbitrate. Therefore, the Respondent's refusal to arbitrate is, I find, also indicative of a retaliatory motive.

Under these circumstances, and absent any other argument by the Respondent that would provide some lawful, non-retaliatory rationale for filing the lawsuit, I conclude there is none. Accordingly, I find that the baseless lawsuit was retaliatory in violation of Section 8(a)(1) of the Act, as alleged. See *Diamond Walnut Growers*, 312 NLRB 61, 69 (1993); Phoenix *Newspapers*, *Inc.*, 47, 49-50 (1989); *H. W. Barss Co., Inc.*, 296 NLRB 1286, 1287 (1989).

## **Conclusions of Law**

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent has violated Section 8(a)(1) of the Act as set forth herein.

# The Remedy

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Having found that the Respondent's filing and pursuit of the lawsuit against the Union violated Section 8(a)(1) of the Act, I recommend that the Respondent be ordered to reimburse the Union for all legal and other expenses it incurred in defending against the Respondent's lawsuit, plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987). I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

## ORDER6

The Respondent, Children's Hospital of Northern California, d/b/a Children's Hospital Oakland, its officers, agents, successors, and assigns, shall:

- (1) Cease and desist from:
  - (a) Initiating and maintaining a baseless lawsuit against the Union in retaliation for the exercise of employees' protected and concerted activities under the Act.
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- (2) Take the following affirmative action which is necessary to effectuate the purposes of the Act:
  - (a) Reimburse California Nurses Association for all legal and other expenses incurred in the defense of Respondent's lawsuit before the United States District Court and the United States Court of Appeals for the Ninth Circuit, in the manner set forth in the remedy section of this decision.
  - (b) Within 14 days after service by the Region, post at its facility in Oakland California copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days

<sup>45</sup> 

<sup>&</sup>lt;sup>6</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>7</sup> If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

.5	emplo Respo any ot (c) No	yees are customarily posted. Rondent to ensure that the notices her material.	recluding all places where notices to Reasonable steps shall be taken by the res are not altered, defaced, or covered by writing within 21 days from the date of this Respondent has taken to comply.	
10	Dated: September	, 2003		
15			Gerald A. Wacknov Administrative Law Judge	
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#### APPENDIX

# NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

**WE WILL NOT** initiate or maintain a baseless lawsuit against the California Nurses Association in order to retaliate against the Union or the registered nurses represented by that Union for calling, participating or threatening to participate in a sympathy strike in support of the collective bargaining efforts of other unions at the Hospital.

**WE WILL** reimburse the Union for all legal and other expenses it incurred in the defense of the Hospital's lawsuit before the United States District Court and the United States Court of Appeals for the Ninth Circuit.

**WE WILL NOT** in any like or related manner interfere with, restrain or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

		CHILDREN'S HOSPITAL OF	
		<u>NORTHERN</u>	
		CALIFORNIA d/b/a CHIL	DREN'S HOSPITAL
		OAKLAI	ND
		(Employer)	
Dated:	Bv:		
	, _	(Representative)	(Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 1301 Clay Street, Suite 300N, Oakland, CA 94612-5211, telephone 510-637-3300.